Tan Kim Hai and Sons Enterprises Sdn Bhd & Ors v Tam Kim San and Sons Sdn Bhd & Ors (Hiap Lee (Choong Leong & Sons) Brickmakers Sdn Bhd & Anor, Interveners)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-22-1067-1994
LOW HOP BING J
10 JULY 1996

Civil Procedure *— Costs — Discontinuance of action — Discontinuance due to matter becoming academic — Action discontinued by consent — Whether each party should bear its own costs — Whether court can go into merit of case to decide on award of costs*

Civil Procedure *— Discontinuance — Discontinuance due to matter becoming academic — Whether such discontinuance amounted to an acknowledgement of defeat*

Civil Procedure *— Injunction — Damages — Injunction granted in action which was later discontinued by consent — Whether inquiry should be held to assess damages that ought to be awarded arising from grant of injunction*

The parties to this action are members, or companies controlled by members of the Tan family. In order to resolve a previous dispute, the parties, together with other members and/or companies of the Tan family entered into a number of agreements ('the agreements') intending to achieve a settlement of family assets situated in Singapore and Malaysia. Subsequently disputes arose in the implementation of the agreements culminating in this action where the plaintiffs and the defendants accused each other of being in breach of the agreements. By this action, the plaintiffs claimed and sought to enforce contractual rights arising from the agreements. The plaintiffs alleged that despite their having fulfilled the obligations under the agreements to procure the sale to the defendants of nine lots of choice lands ('the lands') belonging to subsidiaries of Tan Cheong Leong & Sons Sdn Bhd ('TCLS'), the defendants were in breach of their cross-obligations. To preserve the status quo pending the trial, the plaintiffs sought and obtained on 7 February 1995 an interim injunction ('the injunction') restraining, inter alia, dealings in the lands, and dealings in the TCLS shares which were to be sold by the first defendant to the third plaintiff. Related proceedings were commenced in the Singapore High Court ('the Singapore actions') in which the plaintiffs and defendants were involved. As a result of the Singapore actions, a settlement was reached and a consent judgment was recorded through which the plaintiffs achieved the reliefs that they had sought in this action. Additionally substantial costs were ordered in favour of the plaintiffs. As a result this action was, by consent, discontinued. Two issues then arose for the court's determination, namely, (i) whether the plaintiffs were liable to pay costs to the defendants following the withdrawal of the present action; and (ii) following the said withdrawal, whether there should be an inquiry as to damages pursuant to the

plaintiffs' undertaking to secure the injunction given against the defendants. A

Held:

(1) It is not the law that a plaintiff who withdraws an action must as a matter of course pay the costs of the action. Indeed, the principle is that the court must assess the situation to see why the action was withdrawn (see p 599E–G); *Barretts v Baird (Wholesale) Ltd v IPCS* (1988) NLJ 357 followed. B

(2) On the facts of the case, discontinuance of the action was not an acknowledgement of defeat. The plaintiffs withdrew because of the defendants' capitulation in the Singapore actions and the agreement reached therein, as a result of which the plaintiffs were now in as strong a position as they would have been had they succeeded in this action (see p 599H). C

(3) An inquiry to assess damages ought to be ordered only if there was a finding that the injunction ought not to have been granted or when the plaintiff failed at the trial. In other words, an inquiry would only be ordered where the plaintiffs' case for an injunction, or the plaintiffs' suit, had been defeated. Neither event had transpired in the instant case. Further, discontinuance by reason of the action becoming academic could not be equated with defeat or an acknowledgment of likely defeat. The defendants were therefore not entitled to damages as a matter of course (see p 600B–C). D E

(4) Since the plaintiffs' discontinuance or withdrawal of the instant case was by reason of the action becoming academic, in the circumstances of this case it would therefore be unfair and unjust to penalize the plaintiffs by an order as to costs or damages. Moreover when dealing with the question of costs in the context of an action that was discontinued because it had become academic, the courts had declined to go into the merits of the action. Here, since the withdrawal of this action was by consent of the parties, the court had become functus officio and it was not open to the defendants to ask the court to go into the merits of the case for the purposes of obtaining costs and damages (see p 600D–F); *Hongkong & Shanghai Banking Corp v Timor Electric Cable & Wire Sdn Bhd* [1992] 1 MLJ 779 and *JT Stratford & Son Ltd v Lindley & Ors (No 2)* [1969] 1 WLR 1547 followed. F G H

(5) In the circumstances, each party would have to bear its own costs and there should be no inquiry as to damages (see p 600H).

[Bahasa Malaysia summary I

Pihak-pihak dalam tindakan ini merupakan ahli-ahli, ataupun syarikat-syarikat yang dikuasai oleh ahli-ahli keluarga Tan. Untuk menyelesaikan pertikaian yang terdahulu, pihak-pihak tersebut serta ahli-ahli lain dan/atau syarikat-syarikat keluarga Tan, telah memasuki

beberapa perjanjian ('perjanjian-perjanjian tersebut') yang berniat untuk mencapai penyelesaian aset keluarga yang bertempat di Singapura dan Malaysia. Kemudiannya, pertikaian telah berlaku dalam perlaksanaan perjanjian tersebut dan ini telah berakhir dengan tindakan ini di mana pihak plaintif dan pihak defendan telah saling menuduh sesama sendiri dengan kesalahan memungkiri perjanjian tersebut. Menerusi tindakan ini, pihak plainitif telah menuntut dan cuba menguatkuasakan hak kontrak mereka yang timbul akibat perjanjian tersebut. Plaintif telah mendakwa bahawa walaupun mereka telah menunaikan kewajipan mereka di bawah perjanjian tersebut, iaitu penjualan sembilan lot tanah terpilih ('tanah tersebut') yang dimiliki oleh anak syarikat Tan Cheong Leong & Sons Sdn Bhd ('TCLS'), namun demikian, pihak defendan telah memungkiri kewajipan mereka. Untuk mempertahankan status quo sebelum perbicaraan, pada 7 Februari 1995 pihak plaintif telah berjaya mendapatkan satu injuksi sementara ('injunksi itu') untuk menahan, antara lainnya, urusan berkenaan dengan tanah tersebut dan urusan berkenaan dengan saham TCLS yang sepatutnya dijual oleh defendan pertama kepada plaintif ketiga. Prosiding berkaitan juga dimulakan di Mahkamah Tinggi Singapura ('tindakan Singapura itu') di mana plaintif dan defendan terlibat. Hasil daripada tindakan Singapura itu, satu penyelesaian telah dicapai dan satu penghakiman persetujuan dicatitkan yang melaluinya plaintif memperolehi relief-relief yang dipohon oleh mereka di dalam tindakan ini. Tambahan lagi kos yang agak banyak telah diperintahkan memihak kepada plaintif. Kesudahannya tindakan ini, melalui persetujuan, diberhentikan. Dua isu kemudiannya timbul untuk keputusan mahkamah, iaitu (i) sama ada plaintif adalah bertanggungan untuk membayar kos kepada pihak defendan selepas penarikanbalik tindakan ini; dan (ii) berikutan dengan penarikanbalik tersebut, sama ada penyiasatan berkenaan dengan ganti rugi berkenaan dengan akujanji oleh plaintif untuk menjamin pemberian injuksi itu terhadap pihak defendan harus diadakan.

Diputuskan:

(1) Bukannya undang-undang bahawa plaintif yang menarikbalik tindakan semestinya membayar kos tindakan. Prinsipnya adalah bahawa mahkamah harus menilaikan keadaan untuk memutuskan sebab mengapa tindakan itu ditarikbalik (lihat ms 599E–G); *Barretts v Baird (Wholesale) Ltd v IPCS* (1988) NLJ 357 diikut.

(2) Mengikut fakta kes, pemberhentian tindakan ini bukannya suatu pengakuan kekalahan. Plaintif telah menarikbalik disebabkan kekalahan defendan dalam tindakan Singapura itu dan persetujuan yang dicapai di situ, yang berkesudahan dengan plaintif sekarang mencapai kedudukan yang sama kuat sepertimana mungkin dicapai mereka jikalau mereka berjaya dalam tindakan ini (lihat ms 599H).

(3) Satu siasatan untuk mentaksirkan ganti rugi harus diperintahkan hanya jikalau terdapat perintah bahawa injunksi itu tidak patut diberikan ataupun jikalau plaintif telah gagal di perbicaraan. Dalam perkataan lain, suatu siasatan hanya diperintahkan apabila kes plaintif untuk injunksi ataupun guaman plaintif telah ditolak. Ini tidak berlaku dalam kes ini. Tambahan lagi, pemberhentian disebabkan tindakan ini menjadi persoalan akademik tidak dapat disamakan dengan kekalahan ataupun pengakuan kekalahan. Maka defendan adalah tidak berhak mendapat ganti rugi secara terus (lihat ms 600B–C).

(4) Oleh kerana pemberhentian ataupun penarikanbalik kes ini adalah disebabkan tindakan ini telah menjadi persoalan akademik, dalam keadaan kes ini ianya akan menjadi tidak adil dan tidak saksama untuk menghukum plaintif melalui perintah kos ataupun ganti rugi. Lagipun dalam mengendalikan soal kos dalam konteks tindakan yang ditarikbalik disebabkan ianya telah menjadi persoalan akademik, mahkamah enggan membincangkan merit tindakan tersebut. Di sini, oleh kerana penarikanbalik tindakan ini adalah melalui persetujuan pihak-pihak, mahkamah telah menjadi functus officio dan tidaklah terbuka kepada defendan untuk meminta mahkamah menyiasat merit kes ini bagi tujuan memberikan kos dan ganti rugi (lihat ms 600D–F); *Hongkong & Shanghai Banking Corp v Timor Electric Cable & Wire Sdn Bhd* [1992] 1 MLJ 779 dan *JT Stratford & Son Ltd v Lindley & Ors (No 2)* [1969] 1 WLR 1547 diikut.

(5) Dalam keadaan kes ini, setiap pihak terpaksa menanggung kosnya sendiri dan siasatan tidak akan diadakan berkenaan dengan ganti rugi (lihat ms 600H).]

Notes

For a case on the issue of costs, see 2 *Mallal's Digest* (4th Ed, 1995 Reissue) para 880.

For cases on the award of damages for the grant of an injunction, see 2 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1434–1436.

Cases referred to

Barretts & Baird (Wholesate) Ltd v IPCS (1988) NLJ 357

Hongkong & Shanghai Banking Corporation v Timor Electric Cable & Wire Sdn Bhd [1992] 1 MLJ 779

JT Strafford & Son Ltd v Lindley & Ors (No 2) [1969] 1 WLR 1547

Ushers Brewery Ltd v PS King & Co (Finance) Ltd [1972] Ch 148

K Mohana Dass (*Shook Lin & Bok*) for the plaintiffs.

RR Sethu (*Joseph Yeo* with him) (*RR Sethu*) for the defendants.

Cur Adv Vult

Low Hop Bing J:

Introduction

The parties herein agree that the two questions for the court's determination may be stated as follows:

(1) Whether, in the circumstances of this case, the plaintiffs are liable to pay costs to the defendants following the withdrawal of the instant action by consent on 25 April 1996?

(2) Arising from the above withdrawal, whether an inquiry as to damages should be ordered pursuant to the plaintiffs' undertaking given on 7 February 1995 to secure the injunction granted by this court against the defendants?

Contention of the parties

It was contended for the plaintiffs that the respective answers to both the above questions are in the negative.

The defendants responded that upon the withdrawal of the present suit by the plaintiffs on 25 April 1996, the defendants are entitled to the costs of this suit as costs must follow the event. It was further submitted for the defendants that the injunction would have been dissolved in any event and hence damages should be paid in accordance with the undertaking.

Background facts

The parties to this action are members, or companies controlled by members, of the Tan family. So, to resolve a previous dispute, the parties, together with other members and/or companies of the Tan family entered into a number of agreements ('the agreements') intending to achieve a settlement of family assets situated in Singapore and Malaysia.

Subsequently, disputes arose in the implementation of the agreements culminating in this action where the plaintiffs and the defendants accused the other of being in breach of the agreements.

The scope of the agreements may be described as achieving a corporate divorce by which factions of the Tan family would disentangle their interlocking or joint ownership of family assets in favour of a new arrangement with the rival factions having independent control of different assets.

By the action, the plaintiffs claimed and sought to enforce contractual rights arising from the agreements. The plaintiffs alleged that despite their having fulfilled obligations under the agreements, to procure the sale to the defendants of nine lots of choice lands ('the lands') belonging to subsidiaries of Tan Cheong Leong & Sons Sdn Bhd ('TCLS'), the defendants were in breach of their cross-obligations, in particular:

(1) the sale of 633,453 shares in the Malaysian company namely, TCLS by the second defendant to the third plaintiff; and

(2) the sale of shares in the Singapore company known as Cairnhill Hotel Pte Ltd ('the Cairnhill shares') by the second defendant to the second plaintiff.

Further to their claims abovestated, the plaintiffs by their statement of claim filed herein encl 1 and sought the following reliefs:

(1) an order that the first defendant complete the sale of 633,453 of its share in TCLS to the third plaintiff within 14 days herein;

(2) an order that the second defendant complete the sale of the Cairnhill shares to the second plaintiff within 14 days within;

Alternatively:

(3) an order that the global agreement and/or the settlement agreement be rescinded and that the first and third defendants re-transfer the respective lands to Hiap Lee (Cheong Leong & Sons) Brickmakers Sdn Bhd and Hiap Lee Construction Co Sdn Bhd;

(4) costs.

So as to preserve the status quo pending trial, the plaintiffs sought and obtained on 7 February 1995 an interim injunction restraining, inter alia, dealings in the lands, and dealings in the TCLS shares which were to be sold by the second defendant to the third plaintiff. It is in relation to this injunction that the question of the inquiry as to damages arises.

Related proceedings

There are other proceedings which are relevant for the purposes of the matters which are now in issue. Firstly, Winding-up Petition No D5–28–220–1995 in which one Tan Kim Seng sought the winding-up of TCLS and in which the first defendant appeared as a supporting contributory. Secondly, Suit Nos 1991 and 1992 of 1994 commenced in the Singapore High Court by shareholders of Cairnhill Hotel Pte Ltd including the second plaintiff, seeking orders, inter alia, that the second defendant complete the alleged obligation to sell the Cairnhill shares under the agreements. These two proceedings will be referred to as 'the petition' and 'the Singapore suits' respectively.

As a result of a settlement recorded in the petition and the Singapore suits, the following matters came to pass:

(1) On 28 November 1995 by way of a consent judgment recorded in the Singapore suits, the second defendant was ordered to transfer the Cairnhill shares in his name to the second plaintiff;

(2) On 20 December 1995 in the petition, it was agreed that the first defendant would sell 633,453 TCLS shares to Tan Kim Leng.

Why the plaintiffs are not liable for costs and damages

It is eminently clear from the above facts that the plaintiffs have, as a result of the settlement, achieved the reliefs that they had in the first place sought in this action. It is for this reason only, and not because of any lack of merit, that this action has been discontinued as is plainly stated in para 3

A of the affidavit of Tan Kim Lim affirmed on 29 February 1996 (encl 87). The defendants in their own affidavits also take the position that this action is no longer maintainable because of the settlement of the Singapore suits and the petition (see para 18 of encl 82). The consensus therefore is that this action has been rendered academic by supervening events. This is expressly admitted by the defendants in their solicitors' letter B dated 2 January 1996 addressed to the plaintiffs' solicitors (encl 82; affidavit of Tan Kim San of 1 February 1996; exh C, p 23) in which the opening para reads:

> *KL High Court is No D2–22–1067–92* '... our clients instruct us that the above suits have become academic ... .'

C

The other significant feature which ought to be appreciated is that in the Singapore suits, judgment was entered by consent against the defendant therein, ie the second defendant in this action, in respect of the Cairnhill shares. Additionally, substantial costs were ordered in favour of the plaintiffs as shown by exh D to the affidavit of Tan Kim San affirmed on 12 March D 1996 (encl 88). Apart from testifying to the merits of the plaintiffs' claim, in my considered view, as between the second plaintiff and the defendants, the judgment in the Singapore suits constitutes res judicata on the issue of the Cairnhill shares with the result that in respect of this action, the plaintiffs' claim against the defendants for the Cairnhill shares is valid and E cannot be defended.

Harking back to the legal position, I am of the view that it is not the law that a plaintiff who withdraws an action must as a matter of course pay the costs of the action. Indeed, the principle is that the court must assess the situation to see why the action was withdrawn. In *Barretts v Baird (Wholesale) Ltd v IPCS* (1988) NLJ 357, Henry J observed as follows at p 358: F

> Now in most cases of discontinuance that may well be the general rule because in most cases of discontinuance, the discontinuance is effectively a defeat or an acknowledgement of defeat or a likely defeat. But it is equally possible, and the plaintiffs assert it to be the situation in this case, that discontinuance reflects not defeat so much as that the matter has now G become academic save for the question of costs. In those circumstances where the matter is effectively academic, the court should then look at the matter to see whether the general rule applies because I am satisfied that the general rule should only apply when the discontinuance can safely be equated with defeat or an acknowledgement of likely defeat ... .

H On the facts as alluded to above, I hold the view that the discontinuance is not an acknowledgement of defeat. On the contrary, the plaintiffs are withdrawing because of the defendants' capitulation in the Singapore suits and the agreement reached in the petition, as a result of which the plaintiffs are now in as strong a position as they would have been had they succeeded in this action.

I As for the matter of damages on account of the injunction, I am of the view that the principle abovestated in respect of costs applies also to the question of damages. This may be seen from the decision in *Ushers Brewery Ltd v PS King & Co (Finance) Ltd* [1972] Ch 148, where at p 154, Plowman J observed as follows:

> It is in my judgment established by the authorities that an inquiry as to damages will not be ordered in these cases until either the plaintiff has failed on the merits at the trial or it is established before trial that the injunction ought not to have been granted in the first instance.

It is trite law that an inquiry to assess damages ought only to be ordered if there is a finding that the injunction ought not to have been granted or when the plaintiff fails at the trial. In other words, an inquiry is only ordered where the plaintiffs' case for an injunction, or the plaintiffs' suit, has been defeated. Neither event has transpired in the instant case. Further, as reasoned by Henry J in *Baird*'s case, discontinuance by reason of the action becoming academic cannot be equated with defeat or an acknowledgment of likely defeat. The defendants are therefore not entitled to damages as a matter of course.

Hence, the approach in deciding whether plaintiffs who have discontinued an action should pay costs or be liable on the undertaking as to damages is to see if the discontinuance is an adverse reflection on the merits of their case. This is clearly not so in the instant case.

It is common ground that the plaintiffs' discontinuance or withdrawal of the instant case was by reason of the action becoming academic, in which case it would be unfair and unjust to penalize the plaintiffs by an order as to costs or damages in the circumstances of this case. When dealing with a question of costs in the context of an action that is discontinued because it has become academic, the courts have declined to go into the merits of the action. This was the approach taken by Chong Siew Fai J (now CJ (Sabah and Sarawak) in *Hongkong & Shanghai Banking Corporation v Timor Electric Cable & Wire Sdn Bhd* [1992] 1 MLJ 779. (See also *JT Stratford & Son Ltd v Lindley & Ors (No 2)* [1969] 1 WLR 1547, CA). Since the withdrawal of this action is by consent of the parties, the court has become functus officio and it is not open to the defendants to ask the court to go into the merits of the case for the purposes of obtaining costs and damages.

It is settled law that mere discontinuance of an action does not automatically render the plaintiffs liable for costs or damages, especially when the discontinuance is based on the ground that the action has been rendered academic as opposed to it being withdrawn in acknowledgement of defeat.

In this action, it is clear that withdrawal took place following the plaintiffs obtaining the benefit of the reliefs they sought herein as a result of settlements reached in the petition and the Singapore suits. This action is therefore rendered academic and was properly discontinued by consent of all the parties. In the circumstances there is no finding that the plaintiffs' case is without merit or is likely to fail. The appropriate order to be made would be for each party to bear its own costs and that there should be no inquiry as to damages.

Order accordingly.

Reported by T Vimalavathy